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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-128

MARTIN DIES, JR., ET AL.,
Appellants

vs.

VAN PHILLIP CARTER, ET AL.,
Appellees

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

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BRIEF FOR APPELLEES PATE AND GUZMAN, ET AL.

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On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

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BRIEF FOR APPELLEE PATE AND GUZMAN, ET AL.

STATUTES INVOLVED

FIRST AMENDMENT:

" Congress shall make no law * * * abridging the freedome of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Texas statutes held invalid by the court below are Sections 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code. These statutes are set forth in Appendix A herein.

QUESTION PRESENTED

The sole question presented by Appellants in their Jurisdictional Statement reads as follows:

" Whether Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code are unconstitutional in that they violate the First and Fourteenth Amendments of the Constitution of the United States."

The Appellants have not revived their sole question presented or any other question in their brief and have accordingly abandoned their sole claim or any other claim by failure to comply with Supreme Court Rule 40 (1) (d) (1) and 40 (1) (d) (2). New Haven Inclusion Cases, 399 U.S. 392, 481, n. 78 (1970); J.I. Case Co. v. Borak, 377 U.S. 426, 428-429 (1964). Russell v. United States, 369 U.S. 749, 754, n. 7 (1962); Travelers Health Assn. v. Virginia, 339 U.S. 643, 651, n. 4 (1949).

STATEMENT

This case originated in three separate suits filed in Federal District Courts in the Western District of Texas and the Northern District of Texas (A. 9, 11, 34). A motion to intervene and consolidate was filed by Appellees Jenkins and Guzman, et al., (A. 49-94). Chief Judge John R. Brown, U.S. Court of Appeals for the Fifth Circuit took notice of the transfer of Pate's cause from the Western District of Texas to the Northern District of Texas and ordered the three judge court below reconstituted (A. 3). These suits were consolidated for all purposes and Appellees Jenkins and Guzman, et al., were allowed to intervene as voters Federal Rules Civil Procedure 24 (a) (2) (A. 147) .

The Appellees brought their actions on behalf of themselves and as class actions (A. 11, 70, 85) to enjoin and restrain the enforcement of Articles 13.07a, 13.08, 13.08a, 13.15 and 13.16, Texas Election Code and to have these statutes declared unconstitutional. The three judge court below granted the relief requested (A. 145-159) and enjoined the State of Texas, through its political parties, from the enforcement of these Statutes and declared them unconstitutional (A. 160-161) . The Appellees Pate's and Wischkaemper's motions for preliminary injunction were granted and they were relieved from payment of the filing fees with the proviso that should their claims be later rejected that they would then have to pay the fees not paid (A. 106-107) and their names were placed on the ballot in the May 2,

1970 Democratic Primary election (A.112, 117).

Article 13.07a, Texas Election Code provides all candidates subject to assessment by the County Executive Committee for a part of the expenses of holding the primary election must pay fifty dollars at the time of filing their application for a place on the primary ballot. However, candidates for the State Board of Education need pay only fifty dollars total and a candidate for the legislature need pay only the maximum he may be assessed or the fixed filing fee prescribed for some counties.

Article 13.08, Texas Election Code authorizes the county committee to estimate the cost of the primary election and to apportion such cost among the various candidates for nomination for District, County, and precinct offices except for the offices of Justice of the Court of Civil Appeals, State Board of Education, state senator, and state representative if their assessment or fee is fixed at a definite amount. "In making the assessment upon any candidate the committee should give due consideration to the importance, emolument, and term of office for which the nomination is to be made".

Article 13.08a, Texas Election Code provides that candidates for any precinct, county or district office and the office of Congress in counties with a population of one million or more, except for candidates for the State Legislature and State Board of Education, shall not be assessed more than ten percent of the annual salary for any

office of two-years term and fifteen percent for any office of four year terms. Furthermore, in these counties a candidate for State Representative may be required to pay an amount not to exceed Five Hundred dollars and One Thousand dollars for State Senator. In counties with a population between 900,000 and 1,000,000 candidates for State Senator and State Representative shall pay $300 to have their names placed upon the primary ballot, while candidates for State Senator and State Representatives in counties with a population between 650,000 and 900,00 shall pay $1,000 and $600 respectively. Candidates for State Representative in districts covering from 8 to 9 counties need pay only $25 in each county.

Article 13.15 Texas Election Code provides that candidates for U.S. Senator and all candidates for state officer must pay $1,000 to the Chairman of the State Executive Committee while candidates for Congressman-at-large and for justice of the court of civil appeals shall pay to state executive committee five percent of one year's salary. The above candidates need not pay a filing fee or assessment to any other person or committee.

Article 13.16, Texas Election Code provides unless otherwise provided, no candidate for State Senator shall pay to a county executive committee more than One Dollar for counties of less than 5,000 population; five dollars for counties of 5,000 to 10,000 population; ten dollars for counties of more than 10,000 and less than 40,000 population; fifty dollars for counties of 40,000 and not

more than 125,000 population; seventy-five dollars for counties of more than 125,000 to 200,000 population. However, candidates for State Senator in any senatorial district of two counties need pay only One Hundred dollars regardless of population of such counties. Furthermore, except as otherwise provided in the code, any candidate for State Representative need pay only a total fixed filing fee of $150.00 to be prorated among the counties, if more than one.

The Appellees alleged that the above statutes were unconstitutional on the grounds that said statutes deprived Appellees of an

> " * * * equally effective voice in the election process by an invidious discrimination by imposing * * * exorbitant, unreasonably, arbitrary, capricious, irrelevant, and outrageously high filing fees or assessments which bear no reasonable relation to any legitimate legislative purpose and such filing fees are not germane to one's ability to participate intelligently in the electoral process as a candidate for public office. The filing fees or assessments are so high they may be presumed to have been imposed with the intention of preventing the candidacy of persons unable to pay or who fail or refuse to pay the filing fees or assessments imposed * * *"

and,

> "these fees also prevent qualified voters from voting for those persons whose candidacy is prevented by such filing fees. Furthermore, the introduction of wealth as payment of a fee as a prerequisite or measure of a citizen's or voter's qualification to have his name placed on the primary ballot, or to vote, is to introduce a capricious or irrelevant factor , and the requirement of fee paying in this context as a condition to be a candidate or voter * * * causes an invidious discrimination that per se violates the Equal Protection Clause and furthermore, the Texas Statutes under attack permit and provide an invidious classification discrimination between various candidates for different offices by having different filing fees for the various candidates .* * * Furthermore, defendant will effectively deprive the plaintiff of his right to vote, for the right to run for public office is a correlative of the right to vote. The defendants have denied the plaintiff and class plaintiffs their fundamental political right of freedom of association (political assocation) for the purpose of voting and being nominated as

candidates for public office in the democratic primary in violation of the First Amendment by reason of the Equal Protection and Due Process clauses of the Fourteenth Amendment, by an invidious discrimination through the establishment of filing fees as a prerequisite to running for nomination to public office * * * Articles 13.07a, 13.08, 13.08a, 13.15 and 13.16, Texas Election Code, are void and unconstitutional as they violate the equal protection and due process clauses of the Fourteenth Amendment, and the Freedom of Assembly clauses of the First Amendment to the United States Constitution, in that they impose and permit filing fees or assessments * * * primary election * * * and in future primary elections, upon persons who by reason of their lack of funds or poverty, are unable to pay said filing fees or assessments or fail or refuse to pay said filing fees or assessments. * * * In setting filing fees and assessments at such unreasonable and outrageously high level, and permitting some candidates to file * * * by merely paying a fixed fee, or for State Legislator, the fee of $150.00, the statutes in question * * *. deprive the plaintiff and all other persons similarly situated, of rights, privileges and

> immunities secured by the equal protection and due process clauses of the 14th Amendment, and the freedom of assembly clause of the First Amendment * * * and establishes an invidious classification discrimination * * * [Plaintiff] are deprived of their right to seek nominations to public office, to seek public office, and to the right to vote in the 1970 and in all future primary elections " (A. 11-13, 17-19).

The intervenors alleged they desired to cast their votes in the 1970 primary and future primaries for the particular Appellee they support and for candidates of the class represented by said Appellees. However, intervenors could not so vote for the candidates of their choice because they were poor persons unable or unwilling to pay the filing fees assessed against their candidates who by reason of their economic background can best represent intervenors' political views and economic interest (A. 85-87).

The precinct offices referred to in the above Texas Election Code Statute are justice of the peace and county commissioners. County offices include County Clerk, County Treasurer, County Surveyor, County Courts at Law and County Judge, while district offices cover district courts, district attorney and district clerk. These statutes treat Justice of the Court of Civil Appeals, State Board of Education, State Senator and State Representative in various ways. United

States Senators and Representatives are also treated in various ways in regard to filing fees and assessments. State offices include governor, lieutenant governor, attorney general, state treasurer, commissioners of general land office, state comptroller, supreme court judges, court of criminal appeals judges, state agriculture commissioner, state railroad commissioners. (A. 121-140).

It was stipulated that Appellee Pate meets all qualifications to be a candidate in the Democratic Primary Election for the office of County commissioner (A. 109). Pate timely filed his application accompanied by the required $50 deposit for a place on the May 2, 1970 Democratic Party primary ballot as a candidate for county commissioner (A. 111). The three judge court in their opinion below erroneously stated that Appellee Pate could not pay the $50 deposit (A. 147). The El Paso Democratic Executive Committee assessed candidates in the said primary seventeen percent of assessed salary for the office for which they sought election, except where a fixed fee was set by state statute (A. 110, 121). Pate was assessed $1,424.60 as a filing fee to be a candidate for County Commissioner (A. 110) Pate could not pay said assessment and the Appellant McAlmon refused to place Pate's name on the ballot for the May 2, 1970 primary (A. 111, 112). Pate was relieved from payment of the said assessment by the Court below and ran in the May 2, 1970 primary election (A. 112). Pate lost said primary election, but was endorsed in said election by one of the two major newspapers in

El Paso, Texas and received a total of 3,060 votes out of a total of 10,685 votes cast, while the incumbent received 6,013 and a third candidate received 1,612 votes (A.112). Pate is an announced and prospective candidate for County Commissioner in future elections and will be unable to or will refuse to pay future filing fees and assessments (A.112,113). Appellee Carter is a future candidate for state-wide commissioners of general land office and unable to pay the fixed filing fee of $1,000. (A.113-114) Appellee Wischkaemper was a candidate for county judge in Tarrant County, Texas who could not pay $6,300 fee assessed for that office (A.116-118). He will be a candidate in future elections for county judge and will be unable to pay the assessment (A.117-118). Each intervenor is a voter unable to vote for the Appellees and their class because of their inability to pay their candidate filing fees and assessments (A. 114-115-,119).

In Texas a person cannot have his name placed upon a primary election ballot unless he pays the filing fee and assessment made by the county executive committee or state executive committee of the political party running the primary election. The fees and assessments collected by the county executive committee are the only source of revenue for operating the primary. These costs include the printing of the official ballots, renting polling places, providing and distributing all necessary poll books, blank stationery and voting booths required, compensation of election officers and clerks, and

all other necessary expense of holding the general and second primary and 5 percent of these expenses are given as compensation to the chairman and secretary of the committee. Articles 13.08 and 13.18 Texas Election Code. Any funds in excess of election expenses are refunded to the candidates who made payments to the county executive committee. Those candidates for state offices such as governor who pay a fixed filing fee and no assessments to the state executive committee receive no refund and their fees are for the exclusive use of the State Executive Committee (A.109-113).

There are two hundred and fifty-four counties in Texas. The Attorney General of Texas obtained information on the assessment of candidates in the democratic primary in 58 of these counties and such was made a part of the record as a stipulation (A.116). Due to the high cost of printing of the single appendix, Appellees could not pay for the complete printing of this information. The single appendix contains information on 18 different counties (A.121-139). This information reflects that a justice of the peace in El Paso County was assessed $3,862.40 while another justice of the peace was assessed $1,656.88. In this same county a district judge was assessed $4,063.00 and a state representative paid a fixed fee of $150.00 (A.12).

The following table shows a sample of assessments made against candidates in various counties in the 1970 Texas Democratic Primary Elections: (A.122-134)

1970 Democratic Primary Assessments

County	District Judge	County Judge	County Comm.
Travis	$4,860	$3,204	$1,171.89
McLennon	3,405	2,160	1,789.00
Wichita	2,954	-----	1,320.00
Smith	2,400	2,484	1,560.00
Grayson	-----	2,082	1,605.81
Denton	1,400	777	777.00
Chambers	1,050	973	675.00
Motley	50	100	50.00
Carson	-----	476	423.00
Ward	-----	6,250	6,250.00
Dallas	6,720	6,480	5,520.00
Bexar	7,840	6,300	4,200.00
Tarrant	8,900	6,300	6,100.00

The following table reflects a sample of the assessed salary for various public offices in the 1970 Texas Democratic Primary.

1970 Salaries Elected Public Officers

County	District Judge	County Judge	County Comm.
El Paso	$23,900	$14,400	$8,380
Travis	27,000	13,480	12,500
McLennan	22,700	14,400	13,428
Wichita	24,620	------	13,200
Smith	26,00	20,700	13,000

Grayson	----	12,230	9,432
Denton	20,000	12,000	12,000
Chambers	21,000	9,734	6,758
Motley	----	6,146	1,800
Carson	----	7,944	7,062
Ward	----	8,160	6,270
Dallas	28,000	27,000	23,000
Bexar	28,000	22,500	12,000

The salaries of state elected officers range from $55,000 for governor of Texas to $14,800 for the lieutenant governor (A. 140).

The Court below, in its opinion and judgment, has declared the challenged provisions of the Texas Election Code unconstitutional because they infringe upon the exercise of voting and associational rights without any compelling state justification in violation of the First and Fourteenth Amendments (A. 153).

SUMMARY OF ARGUMENT

The merits of this case present Texas laws that have for 75 years required candidates in Texas Primary Elections to pay for the whole cost of running such elections.

May Texas condition the right to be a candidate and to vote upon wealth? NO. Any state interest in requiring candidates in primary elections to pay from $50 to $8,900 to finance the cost of the election is per se invidious discrimination. May the State require that candidates show voter support by obtaining money from voters to pay filing fees

and assessments? NO. Any state interest in requiring a candidate to ask his voter-supporters to contribute from $50 to $8,900 for filing fees is per se invidious discrimination.

The right to vote and freedom of association (political associates) for the purpose of voting and being nominated are destroyed by the Texas Primary Scheme for financing elections.

Texas has not explained why statewide candidates are not required to pay for any part of the cost of primary elections. These candidates pay a fixed fee of $1,000 to the state executive committee. And state legislators pay a fixed fee that is much less than their fair share of election costs. This aspect of the Texas election law is also per se invidious discrimination.

A poor person and a no so poor person under our constitution may be required to show a significant modicum of voter support by signatures on a petition, but he cannot be required to show support by asking voters or anyone else for $50 to $8,900 to pay a state compelled filing fee or assessment.

The alleged evils of state financed primary elections completely disappear when a reveiw of other state election systems show that these alleged evils do not materialize even when no fee is required.

ARGUMENT

I.

THIS COURT CAN DISREGARD THE SHOTGUN BRIEF OF TEXAS AND AFFIRM, FOR THE TEXAS BRIEF DID NOT INCLUDE ANY "QUESTIONS PRESENTED FOR REVIEW" .

Without including any " questions presented for review" as required by Supreme Court Rule 40 (1) (d) (1) and 40 (1) (d) (2) Texas has filed a shotgun brief. In NEW HAVEN INCLUSION CASES, 399 U.S. 392, 481, n. 78, Justice Stewart has stated that " The Committee has not revived the issue in its brief, nor has it responded in its reply brief to the Government's contention that it has abandoned the claim. Accordingly, we do not consider the matter further" . J. I. CASE CO. v. BORAK, 377 U.S. 426 , 428-429 (1964). In BENITES v HAMPTON , 123 U.S. 519 (1887) the Court dismissed the case for failure of the brief to contain specifications of errors. PORTLAND CO. v UNITED STATES, 82 U.S. 1, 15 WALL. 1 (1873), RUSSELL v UNITED STATES, 369 U.S. 749, 754, n. 7 (1962); TRAVELERS HEALTH ASSN. v VIRGINIA , 339 U.S. 643, 651, n. 4 (1949) .

The brief of Texas clearly reflects that by way of argument an attempt has been made to present additional questions or to change the substance of the question presented in the Jurisdictional Statement. This Court's Rule 40 provides that questions not presented in accordance with paragraph

(1) (d) (2) of Rule 40 will be disregarded, unless plain error is noted. These additional arguments cannot be deemed to be subsidiary questions fairly comprised within the jurisdictional statement question presented. An example of the methods of Texas is found in their brief at page 9 when they request a re-examination of the SMITH v ALLWRIGHT, 321 U.S. 649 (1944), State Action Rule, notwithstadning such was not raised in their Jurisdictional Statement. The Court below held that "It is undisputed that primary elections of political parties are state action and subject to the Fourteenth Amendment." (A. 148) .

Appellees are faced with a dilemma as to which issues raised in the Texas brief must be answered. Indeed, this is the reason why a brief must contain "questions presented for review". A proper solution would be for this Court to affirm upon the opinion below where Appellees had a fair opportunity to reply to the contentions of Texas.

It is obvious that with the amendment of Texas Election Code Articles 13.07a, 13.08, 13.08a, 13.08a-1, 13.16, Texas has taken the first step to evade the lower federal court decisions in order to defeat federal constitutional rights of voters and candidates in primary elections. The next step may have been the omission of any "questions presented" in their brief before this Court. Therefore, appellees shall answer every issue raised by the argument of Texas. Notwithstanding

the foregoing, it is urged that this Court affirm the judgment of the lower court in order to establish a solid precedent in this important area of law.

In the event this Court does not give a difinitive answer by a memorandum affirmance of the judgment below, or by a written opinion, then judicial time has been wasted and future litigation concerning the same situation will appear shortly. Justice dictates that this Court render a decision on the merits now so that in the next primary election, Texas and citizen-voters of Texas will know whether candidates can be forced to pay the complete cost of primary elections in Texas.

II.

THE CONTINGENT AND TEMPORARY AMENDMENT OF PART OF THE TEXAS ELECTION CODE HELD UNCONSTITUTIONAL BELOW DOES NOT MAKE THIS APPEAL MOOT.

The Texas Legislature by H.B. 5 Special Call Session, 62nd Legislature, (June 4, 1971) Amended Articles 13.07a, 13.08, 13.08a, 13.08a-1 and 13.16, Texas Election Code. However, these amendments were contingent upon this Court's action in the case at bar and such amendments are temporary in nature. Section 7 of H.B. 5 supra, concerning the contingent and

and temporary nature of the Texas Election Code Amendments is set out below.

Sec. 7 (a) This Act is enacted as a contingent, temporary law, to become effective only as stated in Subsection (b) of this section; and if it does become effective, it expires on December 31, 1972.

(b) This Act becomes effective only upon the condition that, before January 1, 1972:

(1) The Supreme Court of the United States does not dispose of the appeal filed in that court from the judgment of the United States District Court for the Northern District of Texas, Dallas Division, in Civil Action No. CA 3-3635-C, styled Van Phillip Carter v. Martin Dies, Jr., et al, by action which becomes final before January 1, 1972; or

(2) the Supreme Court of the United States affirms or refuses to review the judgment of the district court in the aforesaid case, or by other action taken upon an appeal of that case the Supreme Court rules that either of the following sections of the Texas Election Code as they exist before the amendments made by this Act violates the Constitution of the United States: Sections 185a, 186, 186a, 193, and 194.

(c) Not later than January 5, 1972, the Attorney General of Texas shall certify to the Governor and to the Secretary of State whether either of the two conditions stated in Subsection (b) has been fulfilled, and the Governor immediately shall issue his

proclamation declaring whether this Act becomes effective. If either of the conditions for effectiveness is fulfilled, the Act takes effect on the date of the Governor's proclamation.

(d) If this Act takes effect, upon its expiration on December 31, 1972, the law as it existed before the effective date of the Act again becomes operative until otherwise provided by the Legislature.

It is undisputed that each Appellee and class appellee herein will be either a candidate or voter in future Texas primary elections to include those to be held after December 31, 1972 (A. 109-119, 148) and they cannot and will not pay the filing fees and assessments required of candidates in such Texas Primary elections. Furthermore, this is a class action brought by prospective candidates and voters who could not pay filing fees and assessments in 1970 and their class will not be able to pay these unconstitutional fees and assessments in future Texas primary elections. In light of these facts, no mootness appears.

The burden of the Election Statutes declared unconstitutional remains for elections to be held after December 15, 1972, except Article 13.15, Texas Election Code was not amended. These statutes will be effective in the future. In MOORE v OGILVIE 394 U.S. 814 (1969) Justice Douglas wrote that " But while the 1968 election is over, the burden which MacDougall v. Green, supra,

allowed to be placed in the nomination of candidates for statewide offices remains and controls future elections. * * *. The problem is therefore 'capable of repetition, yet evading review', Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 " and this Court turned to the merits." WHITCOMB v. CHAVEZ, __U.S.__ (decided June 7, 1971).

It is urged that this Court now turn to the merits of the case at bar.

III.

THE TEXAS ELECTION SCHEME FOR FINANCING PRIMARY ELECTIONS IS UNCONSTITUTIONAL UNDER ANY CONSTITUTIONAL STANDARD APPLIED TO EITHER CANDIDATES OR VOTERS.

The Texas Classification of candidates by the length of their pocket books alone as the yardstick of whether their names appear or do not appear on the primary ballot is unconstitutional under the First and Fourteenth Amendments and cannot be saved by Texas as a means to control and limit the ballot.

The Texas Election Code creates by State Action a favored group of citizens (rich candidates and rich voters) and the grant to them of preferred political rights in primary elections is the worst of all discriminations under a democratic system of government. Constitutional rights extend to primary elections where such are

an integral part of the procedure of choosing elected public officials and in Texas democratic primaries effectively control the choice, (A. 156). There is more to the right to vote than the right to pull a lever on a voting machine, or to mark a piece of paper as a ballot.

Federally protected rights suffer, for the favored group has full voting strength by reason of their wealth. There is no restriction on the primary ballot, except office qualifications, other than wealth. In other words, any person otherwise qualified can place his name on the ballot by financing the cost of the election. The groups not in favor and unable to pay, have their votes destroyed when a candidate without wealth is not permitted to be a primary candidate.

In JENNESS v FORTSON, __U.S.__ 29 L.Ed. 2d 554,562, decided June 21, 1971, this Court held "there is an important state interest in requiring some preliminary showing of a significant modicum (a little) of support before printing the name of a political organization and its candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election", and "the fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other" for "sometimes the grossest discrimination can lie in treating things that are different

as though they were exactly alike * * *." Is a candidate and his supporters-voters showing merely a "significant modicum (a little) of support" before printing the name on a primary ballot by paying an assessment of $8,900? (This brief, pages 12-13). Are there obvious differences in kind for democratic purposes between the needs and potentials of wealthy democratic primary candidates and voters, on the one hand, and not wealthy democratic primary candidates and voters on the other? NO. The record (A.121-138; This Brief, pages 12-14) herein reflects that a democratic candidate in a Texas primary must make a preliminary showing of a significant personal wealth or by willing and wealthy supporters before his name is printed on a primary ballot. And this showing is based significantly on the length of pocket books alone. There are no nominating petitions or write-in candidates in Texas Primaries (H.B. 5, supra, not considered applicable here). This showing of support in the primary requirements range from $1,424.60 for county commissioner in El Paso County, to $5,520 in Dallas County and from $3,862.40 for justice of the peace, precinct 7, in El Paso County, to $4,320.00 in precinct 1 of Dallas County (A.121,133). Indeed, a primary county clerk candidate was assessed $2,448 in El Paso County in 1970 (A.121) and in Tarrant County he was assessed $6,300 (A. 135). Under the Texas Primary Election Scheme the stigma involved in being rich is that your wealth ipso facto gives you a "significant modicum of support" and a place on the primary ballot while the stigma of not being wealthy ipso facto gives

you no "significant modicum of support".

In the 1970 democratic primary election in El Paso County, Texas, there were three candidates for County Commissioner of Precinct Four. Each candidate was assessed $1,424.60 to pay for the cost of the election (A. 110, 112, 121-122) . The incumbent and a third candidate in said election paid the $1,424.60 assessment and Appellee Pate was relieved from this payment by the Court below (A. 106-107). The third candidate in said election ipso facto had his name placed on the ballot by payment of $1,424.60 and received 1,612 votes. Appellee Pate had no ipso facto support by wealth and was unable to pay this assessment and after the April 3, 1970 order of the Court below placing him on the ballot, was able to obtain an endorsement in the democratic primary election of May 2, 1970 by one of the two major newspapers in El Paso, Texas and 3,060 votes in said election out of a total of 10,685 votes cast (A. 112).

Texas admits "that a man's wealth has little to do with his qualifications to hold public office" (Texas Brief p. 9). (Emphasis added) Under the democratic process and system, a mans wealth has no relationship to his qualifications to hold public office. Then Texas asserts that "a poor man * * * does not have to run in a party primary". (Texas Brief pp. 9-10) Yet, in the overwhelming majority of Texas political offices, nominations by the Democratic Party is tantamount to election, it is clear that

restrictions on entry into the (democratic) primary may significantly impair the right to cast one's vote effectively". (Thornberry, Circuit Judge, concurring specially in court below, A. 156). " Texas, open to economic initiative and technical innovation as are few places on earth, changes at a dizzy pace, but its politics remain old-fashioned, the politics of a one-party state resisting outside influence and rejecting northern preoccupations", WILL TEXAS VOTE? 237 The Economist 44 (October 31, 1970, number 6636). Then Texas endorses the methods of "democratic counties" under communist rule with the position that "no voter is fenced out of the voting booth by the filing fee requirement. The filing fee simply limits the person for whom the voter may cast his ballot". (Texas Brief, p. 13) (Emphasis added)

Appellants urge that "this case is about fees and political party primaries, and whether two men: one rich and one poor, are being treated equally, or whether there is invidious discrimination" (Texas Brief, p. 14) and that stability of our country is due primarily to the two party system (Texas Brief, p. 17) for any other system will contribute to the breakdown of such stability. Then they complain that the lower court's decision has placed the burden of financing primary elections upon the taxpayers-voters (Texas Brief, p. 18-19). What other burden should a free country meet first than to finance the primary, general and special elections that makes it a free country! Texas then says that the lower court decision will insure a large list of candidates and that

this is bad. It is difficult to understand how the competition that Appellee Pate gave to the incumbent was bad (A. 112-113).
And Appellee Pate came in second in a three way race with 3,060 votes out of 10,685 votes cast, but he did not have "sufficient support to raise the filing fee" from wealthy voters ($1,424.60) and therefore "he does not need to be a candidate" (Texas Brief p. 19).
Texas your millionaires can run for office in primary elections, but 99 percent of your citizens-voters could not pay up to $8,900 cash for a district judgeship or $5,520 for a seat as a county commissioner (A. 133-135).
Texas, many of your elected officials must look to the wealthy to pay their filing fees and assessments and the resulting charge of corruption can be heard on radio and television and read in the paper everyday as of late.
Texas, you finance your great university, your school, your tremendous highway system, why do you fight the financing of the most essential duty of government, when you know that the primary elections, in the most part, are tantamount to election.

It is claimed that Texas political parties regulate the size of their primaries by the statute under attack (Texas Brief p. 20). This is not true, it is State Action based upon wealth that regulates primaries through a wealth classification. "The interests to be viewed and weighed and balanced are those of an indigent who cannot afford filing fees, as opposed to the added work and potential litigation that is created by * * * a petition." (Texas Brief p. 21) (Emphasis added) Are

candidates and voters who cannot pay fees and assessments of up to $8,900 (A. 121-139, 158) indigents? No. Nothing lese need be said. Nor do all persons without wealth break the law. (Texas Brief p. 21)

The Appellant's Brief continues with the assertion that men without money for a filing fee and assessment are not defeated in elections, but that such is " a relevant question as far as access to the ballot is concerned." (Texas Brief p. 21-22).
Then Texas urges that "as long as a poor man, (one who cannot pay up to $8,900) has a reasonable opportunity to get on the ballot in November (as an independent candidate), the fact that he cannot get on the party's primary ballot, because he cannot pay the filing fee (up to $8,900) does not invidiously discriminate against the poor man." (Texas Brief, p. 22) (Emphasis added). " In the case at Bar, those against whom the law discriminates can vote, they just cannot get their own candidate on the ballot." (Texas Brief p. 22) (Emphasis Added). The case at bar is settled for Texas admits that the "law discriminates". An intentional or purposeful discrimination has been shown and admitted and under SNOWDEN v. HUGHES, 321 U.S. 1 (1943) the judgment below can be affirmed.

Yet, Texas argues there is no unconstitutionality for "a remote limitation on a particular voter (the possibility that his candidate is not on the ballot) is no reason to depart from this principal" of not stretching the equal protection clause. (Texas Brief 27). In the 1970 Democratic Primary Election in El Paso County,

Texas 3,060 voters would have had "a remote limitation" on their right to vote for Pate and one of the two major newspapers in such county would have had "a remote limitation" placed on its freedom to endorse Pate for election in the primary (A. 112). Appellants will still urge that it is not unconstitutional to deny 3,060 voters freedom of choice at the primary ballot box or to deny a major newspaper an opportunity to endorse a candidate of their choice.

"Appellees * * * (are denied) the opportunity to vote for candidates they might have liked to have seen on the ballot, but this differs drastically from an absolute denial of voting." (Texas Brief p. 24). The above results are justified by Texas as reasonable and rational for they permit financing of primary elections completely by assessments against candidates and limit or control the number of people on the primary ballot. In order to accomplish the above objectives, the Texas Election Code Statutes challenged herein classify candidates by their wealth and there are even sub-classification for state representatives pay a fixed fee of $150, the govenor pays $1,000 while the actual cost of the elections are paid by local candidates such as a judge in Tarrant County, even if he is unopposed, must pay a $8,900 assessment. This statutory election scheme for financing primary elections results in double invidious classification for such permits unconstitutional classification between candidates as to the amount they must pay while some do not even have to pay for the election, but merely support the State Executive Committee with their fees. This primary election scheme is per se exorbitant, unreasonable, arbitrary,

capricious, irrelevant to the election process, and outrageously high. In effect, there is even discrimination between candidates, for local candidates have to pay for their share of the primary expenses while other candidates (statewide and legislative) pay no cost of the primary expense or are subsidized to a point of the absurd.

How can Texas in good faith urge that a $8,900 "filing fee as an initial step in entering a career based on public service in elective office is no more a form of invidious discrimination by wealth in the following of a career than the license fees required to engage in may business professions or union dues." (Texas Brief p. 29). Would this Court permit a $8,900 fee for a young attorney or doctor to obtain a license to enter their profession and require them to pay this fee again every two or four years. The initial step to being elected to a Texas office may well be a high filing fee, for once elected the high fees are paid for by those who seek to corrupt the incumbent. It is common knowledge that high filing fees and assessments stop competition in election and most elections go by default for there are no opponents running against incumbents. Yet these incumbents must still pay up to $8,900 cash as assessments.

The truth as to the intent and purpose of high filing fees was admitted by Texas on April 3, 1970 in the hearing on preliminary relief granted by the Court below. (A. 106-107). There Texas told the three-judge court below, (Tr. p. 50 April 3, 1970 hearing) that:

"Again as a practical matter, I have found that the Judges sort of, at least District Judges around El Paso rather like the high filing fees, it keeps the opponents out, that is a different side of the same question. But yes, that concerns me, because I think that it's not altogether fair to allow some people to run for State-wide offices and not pay their share, and another candidate to do so. But this is the means that the legislature has selected to pay and I think there is a box created about paying for the Democratic and Republican Primaries."

Texas will urge in its reply brief that the intent and purpose of the Election Code Statutes are not bad and how can Appellee say that the Texas Legislature and politicians would want to discriminate against persons without wealth in order to remain in office. It has long been the position of the Texas Attorney General's Office and Judges of Texas that "case is not *** tried under the Federal Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution. *** I took an oath to uphold this Constitution; not the Federal Constitution but the State Constitution". Foregoing is an excerpt from Estes v. Texas, 381 U.S. 536 (1965) and was a statement of a Texas Judge who paid high filing fees with the knowledge he would thereby eliminate most opponents from the start.

Texas placed in the record as a stipulation (A. 116) a letter from A. F. Edwards, Chairman, Democratic Executive Committee of

Wichita Falls, Texas. (A. 127). Mr. Edwards taught government for 30 years and has been on the Wichita Falls Democratic Executive Committee for 40 years, chairman for six years. Mr. Edwards made the following statements in his letter:

> "For a long time, I have thought the assessments for the primary elections are unduly heavy, and tend to discourage those who can't afford it from running for office. * * * I have thought for a long time that the primaries should be paid for as are the general election (by the State), same election officials, for both primaries, giving the voter whichever ballot he wants * * *."

Mr. Edwards, you are congratulated for your candor and honesty. Texas needs more politicians of your caliber.

In order to keep the "poor man" off of the primary ballot in Texas, Appellants have alleged many state interests or justifications. These alleged state interests seem to be (1) to limit the size of primary ballots, (2) to provide political parties with a means of financing primary elections, (3) to keep taxpayers from paying for primary elections, (4) to ensure that persons are willing to sacrifice financially to be primary candidates, (5) to avoid voter confusion by controlling by wealth the number of people on the ballot, (6) to ensure the candidates have a significant financial modicum of support, and (7) to prevent third political parties as " stability of the governments of the English speaking

peoples of this world is due primarily to the fact that they have essentially two party system" (Texas Brief, pp. 17-30)

Texas points with pride to Article 13.50 et seq., Texas Election Code, as a means by which a person can get on the general ballot as an independent candidate . These statutes provide for a nominating petition from one per cent to three per cent and not to exceed five hundred in local elections. This so called lenient means has not caused voter confusion in Texas, because in Texas independent candidates do not win elections, so few persons file as independent candidates.

IV.

APPELLANT MARTINE DIES, JR. PRESENTED AN ELECTION CODE REPORT TO THE TEXAS LEGISLATURE THAT IS INCONSISTENT WITH MANY CONTENTIONS IN THE TEXAS BRIEF FILED HEREIN.

Appellant Dies is the Texas Secretary of State who is appointed by the Governor and he acts as the chief election officer in Texas. Article 4, Section 21, 1 Vernon's Texas Constitution 819.

Dies, as Texas Secretary of State, presented proposed election law changes to the 62nd Texas Legislature on December 10, 1970. This report was cited by the Court below (A. 151, 158). Part of the report is set

forth in Appendix B herein. In the report, Dies admits in effect that filing fees assessed in some Texas counties in primary elections are exorbitant and recommends primary expenses be borne by the county and state (Appendix B, this Brief, pp 60-61, 65).

This report reflects that no other state " with a similar population * * * placed the burden of holding and financing primary elections upon the participating political parties * * *", and, "* * * Texas has the highest primary filing fees in the nation. In fact, a survey of all of the states shows absolutely no state which has primary filing fees that even approach the levies in Texas. * * * It should be noted that excluding Texas, 6 percent of an annual salary is apparently the highest levy in the United States for primary filing fees for county and state officers. Most states charge 2 percent or less of the annual salary". (Appendix B, this brief, pp. 58-61). The report shows that "District judges in Tarrant County were assessed approximately $8,900 in 1970. This figure represents about 30 percent of their annual salary " and " Extremely high filing fees sometimes have the effect of reducing the number of candidates who will file for nomination. When fewer candidates file for office, there is less money to operate the primaries. For instance, Harris County Democratic primaries in 1970 cost less than the primaries in 1968. Yet the assessments to the candidates were higher because fewer candidates filed for nomination " (Appendix this Brief pp 60-61, 78).

The above report of the Texas Secretary of State is an admission by Appellants that the Texas scheme for financing primary elections is unconstitutional under any test. The Secretary of State did not tell the Texas Legislature that the system held unconstiby the Court below was good, rather he said it was bad. He never told the Texas Legislature that it was needed to limit and control the ballot and to avoid voter confusion, but he did recommend "that Texas adopt procedures making the operation of the primaries a state and county responsibility. This will allow the state and county government to share the cost of the primaries" (Appendix B, this Brief p.65). The Secretary never said that state financial primaries would cause any of the problems asserted in the Brief of Texas or that any State interest would be served by the financing of primaries by candidate assessments.

The Attorney General of Texas, an elected office subject to paying the $1,000 fee required by Article 13.15, Texas Election Code, is the only person permitted under Texas law to represent Texas before this Court. Article 4, Section 22, 1 Texas Constitution Annotated 821. The Texas Attorney General is completely independent of the governor and secretary of state. Perhaps this is the reason that one arm of Texas government tells the Texas Legislature one thing and another independent arm of Texas tells this Court something else.

V.

THE SCHEME FOR FINANCING TEXAS PRIMARY ELECTIONS CONSTITUTES STATE ACTION.

In NIXON v HERNDON, 272 U.S. 536 (1927) a Texas statutory classification that prohibited negroes from participating in Democratic party primary elections was held to be unconstitutional under the Fourteenth Amendment for the same reason that a denial of a vote at a final election would be unconstitutional. Texas substituted a new statutory scheme permitting a party executive committee to prescribe who shall vote or otherwise participate in its primary election. The Texas Democratic party thereupon adopted a white-primary rule. This Court, speaking through Justice Cardozo, in NIXON v CONDON, 286 U.S. 73 (1932) held that the Texas Democratic Executive Committee was subject to restraints of the Constitution as representatives of Texas and the elimination of negroes from Democratic Party Primary elections, was an invidious discrimination in violation of equal protection of the law.

The landmark case of SMITH v ALLWRIGHT, 321 U.S. 649 (1944) held that a primary election in Texas was per se an integral part of the machinery for choosing officials. Consequently the primary electoral process is essentially a state function. In that case Justice Reed wrote that "it may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like

the right to vote in a general election, is a right secured by the Constitution " .

In SMITH v ALLWRIGHT, supra, Justice Reed described the financing of Texas primary elections as follows:

> " The plan of the Texas primary follows substantially that of Louisiana, with the exception that in Louisiana the state pays the cost of the primary while Texas assesses the cost against candidates. In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the state or through state requirements, it is state action which impels. When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination as abridgment should be applied to the primary as are applied to the general election " .

The Texas election statutes held unconstitutional by the Court below provide the scheme for financing Texas primary elections as described by Justice Reed in the SMITH case in 1944.

Notwithstanding the foregoing, appellants in their brief at pages 9-10 request this Court to hold that filing fees and assessments paid through state requirements are not state

action as a poor man "does not have to run in a party primary". This argument is wrong and in fact has not been properly raised in this Court. ELMORE v RICE, 4 Cir. 1947, 165 F. 2d 387; BUSKIN v BROWN, 4 Cir. 1949, 174 F. 2d 391; TERRY v ADAMS, 345 U.S. 461 (1953).

In 1904, the Texas State Democratic Executive Committee issued a recommendation to the local party organization to the effect that the party authorities in all primaries permit all white Democrats to participate who would be qualified voters under the law at the succeeding general election. "The White Primary ", 8 Miss. Law J. 139. It was not until 1952 in TERRY v ADAMS, 345 U.S. 461 that this Court put a complete end to White Primary Elections in Texas. The Jaybird Party Association was organized in 1889. It took 62 years to put an end to its discrimination.

"James H. Booser has shown that the direct primary was first employed by the Democratic Party in Crawford County, Pennsylvania, in 1842"."The Direct Primary in Idaho " , Boyd A. Martin, Stanford University Press (1947) at page 10, call number 324. 237, M. 363 d, Texas enacted its first primary law on April 8, 1895 and it was known as the Terrell Election Laws. General Laws of Texas, Twenty-fourth Legislature (1895) chapter 46. It has now been 75 years that wealth has been required as a condition to candidacy in Texas. It is urged that this Court put a final end to wealth discrimination in Texas primary elections now.

VI.

TEXAS VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS BY MAKING WEALTH AN ELECTORAL STANDARD FOR CANDIDATES AND VOTERS IN PRIMARY ELECTIONS.

The two correlative rights of any person, to become a candidate in a primary election and the right of voters to vote in such elections for whomsoever they choose, are at issue herein. The Appellants are here as representatives of persons in Texas who desire to remove the state barrier of wealth or affluence which restricts participating in the political process by those voters and candidates unable to pay from $50 to $8,900 as filing fees and assessments.

In HARPER v VIRGINIA BOARD OF ELECTIONS, 383 U.S. 663 (1966) this Court in striking down Virginia's poll tax, said:

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classification which might invade or restrain them must be closely scrutinized and carefully confined [citation omitted] * * * the right to vote is too precious, too fundamental to be so burdened or conditioned." 383 U.S. 670.

Once Texas granted the electorate the franchise and the right to be candidates in primary elections, then classifications may not be drawn which are inconsistent with the First and Fourteenth Amendments, and "voters qualifications have no relation to wealth nor to paying or not paying this or any other tax." HARPER CASE, 383 U.S. at 666. UNITED STATES v TEXAS, 252 F. Supp. 234, 252 (W.D. Tex. 1966); UNITED STATES v ALABAMA 252 F. Supp. 95 (1966). Texas filing fees and assessments are used to raise revenue and are considered a tax. CAMPBELL vs. DAVENPORT, 5 Cir. 1966, 362 F. 2d 624. Cf. Waples v. Marrost, Texas Supreme Court 1916, 184 S.W. 184, holding that the taxing power of Texas cannot be used to pay the expense of primary elections for such elections do not serve " a public purpose " .

Justice Douglas tells the true standard for testing the Texas Scheme for financing primary elections when he wrote in the HARPER case that:

> "But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed , or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race [citation omitted] are traditionally disfavored." 383 U.S. at 668.

Subsequent to the HARPER case three federal courts have held a requirement of paying a filing fee to qualify as a candidate in the electoral process is unconstitutional as a violation of Equal Protection. JENNESS v. LITTLE, N.D.Ga.1969, 306 F.Supp. 925; GEORGIA SOCIALIST WORKING PARTY v. FORTSON , N.D.Ga.1970, 315 F.Supp 1035, 1040,affirmed on other grounds JENNESS v. FORTSON, ___ U.S. __, 29 L.Ed. 2d 554. Filing fees as requirement to run for office have been held unconstitutional in BOLLINGER v. McLAUGHLIN, 22 S.D. 206, 116 N.W. 70 (1908); ADAIR v DREXEL, 74 Neb. 776, 105 N.W.174 (1905); KELSO v COOK 184 Ind. 173, 110 N.E. 987 (1916); LEDGERWOOD v PITTS, 122 Tenn. 570, 125 S.W. 1036 (1909).

In JENNESS v FORTSON _U.S._, 29 L.Ed. 2d 554 (1971) prospective candidates and their voter-supporters brought an action based upon the First and Fourteenth Amendment to declare Georgia laws that require filing fees and a 5% nominating petition unconstitutional. The District Court in the JENNESS case, GEORGIA SOCIALIST WORKERS PARTY v. FORTSON 315 F.Supp. 1035 (1970) held that candidates and voters had standing to bring the suit. This Court in the JENNESS case decided the issues of the abridgement of "freedom of speech and association guaranteed to that candidate and his supporters by the First and Fourteenth Amendment" and violation of the "Fourteenth Amendment by denying the non-party candidate the equal protection of the law". It was held that 5%nominating petitions

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was constitutional and the state did not appeal the district court's holding that filing fee requirements of 5% of the annual salary operates to deny equal protection to prospective candidates. It is now clear, in light of the JENNESS case, that each appellee herein has standing under the First and Fourteenth Amendment in regards to their rights to run for state office and to vote in state elections. See ANDERSON v MARTIN, 375 U.S. 399 (1964) where a candidate in a school board election had standing under equal protection clause. SNOWDEN v HUGHES, 321 U.S.1 (1944) is dead in light of the JENNESS case.

In TURNER v FOUCHE, 396 U.S. 346, (1970), a class action by freeholders and non-freeholders challenging the limitation of schoolboard membership to freeholders as a violation of the Equal Protection Clause, Justice Stewart wrote that "challenged classification rests on grounds wholly irrelevant to the achievement of a void state objection "and "appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidious discrimination qualifications. The State may not deny some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." Wealth is not a "compelling" state interest. KRAMER v UNION FREE SCHOOL DISTRICT, 395 U.S. 621 (1969) and CIPRIANO v CITY OF HOUMA, 375 U.S. 701 (1969).

A state may not consider fiscal matters to draw an invidious distinction between classes of its citizens. SHAPIRO v THOMPSON, 394 U.S. 618 (1969) and a characterization of voting or candidacy for office as a "right" or a "privilege" does not decide constitutional rights. SHERBERT v. VERNER, 374 U.S. 398 (1963); GRAHAM v RICHARDSON _U.S._, 29 L.Ed. 2d 534 (1971).

In BODDIE v CONNECTICUT, decided March 2, 1971, _U.S._, due process required a "countervoiding state interest of overriding significance" before a poor person is denied access to a divorce court because he cannot pay a fee of $60. And a state's assertion that a fee is necessary as a cost recoupment has been rejected. GRIFFIN v ILLINOIS, 351 U.S. 12 (1956) and requiring indigents to pay a filing fee before a writ of habeas corpus could be considered , was invalid under the Equal Protection Clause. SMITH v BENNETT, 365 U.S. 708.

The state interest shown by significant modicum of voter support by means of signatures on a nominating petition, JENNESS v. FORTSON, __U.S.__, 29 L. Ed. 2d 554, 562 (1971) does not mean there is an important state interest shown by requiring that primary candidates pay for the complete cost of the election when Texas assessments range from $50 to $8,900 and some candidates merely pay a small fixed fee and the fixed fee of others does not go to finance the primary election at all, but rather finances the state political executive committee. The payment of a $8,900

assessment means that the candidate is wealthy or has wealthy supporters whether they be Texas voters, banks or a New York insurance company. A candidate need not pay money to obtain signatures as a form of support unless some other statute requires a notary fee for notarized signatures.

If this Court holds filing fees per se unconstitutional, the Appellees and their class will be protected from the type of State shenanigans (H. B. 5, supra, requires a notarized petition signed by 10% of the voters and a pauper's oath) under which the affluent qualify for election through the easy route (for them) of paying a filing fee while the poor or not so poor will be required as a condition of candidacy in the same primary election to meet other, onerous, requirements. The Texas 10% petition must be notarized and completed within 90 days with each signer becoming ineligible to thereafter affiliate with other parties.

In El Paso County in the last general election 27,315 persons voted for democratic governor. See Appendix C herein for the official vote for Texas governor in the 1970 General Election by counties. Therefore, a petition for any country-wide race in El Paso must contain 2,732 notarized signatures to qualify a poor candidate in the 1972 primary election and at a cost of $.50 for each oath administered and the notary fees would be $1,325.00 for such petition. Article 3945 V.A.T.S.; H.B. 5, supra. The 10% notarized petition resulting in a $1,325 cost is unconstitutional. See EVANS v. CORNMAN, 398 U.S.

419 (1970) ; PHOENIX v. KOLODZIEJSKI, 394 U.S. 204 (1970) on compelling state interest.

Furthermore, Texas law places an arbitrary restriction upon independent candidates in that they cannot obtain notarized signatures on their petitions until the primary elections are over and no one voting in a primary may sign the petition of an independent candidate. Article 13.50 et. sq. Texas Eleetion Code. See WILLIAMS v. RHODES, 393 U.S. 23 (1968).

While this Court does not sit to decide abstract questions, it is also true that the law is not a game. The legal resources available to Appellees' class are sorely limited. It would be equally unfortunate to dissipate these resources and to have unsettled constitutional questions raised here, thereby necessitating additional legal action to obtain relief for the 1972 primary elections. Therefore, Appellee Pate and Guzman, et al, join with the State in presenting H. B. 5, supra, for constitutional review by the Court.

There seems to be no real issue that Texas has created a classification that discriminates by wealth in regard to primary election. The real issue in whether that discrimination is justified by the State interest advanced by way of argument. It has long been argued that putting a price on the right to vote is bad for both negro and white voters. "Political machines for years have made a regular practice of buying blocks of Poll Tax receipts for their henchmen and herding them in to vote the will

of the political boss." The Poll Tax, American Council on Public Affairs, 1942, p. 6, Call Number 336.25 Am 35p. The effect of high filing fees is that many candidates are bought by wealth.

The State of Arizona has not experienced the evils raised by Texas in their brief against State financial primary elections. Article 7, Section 14 of the Arizona Constitution reads as follows:

> "No fee shall ever be required in order to have the name of any candidate placed on the official ballot for any election or primary."

Arizona does require a non-notarized nominating petition with voter signatures representing from one to five percent of the vote in the last election. Article 16-301 to 16-306, Arizona Revised Statutes.

CONCLUSION

It is respectfully submitted that the three-judge district court below was correct in its conclusion that Texas Election Code Scheme for financing Primary Elections violated the First and Fourteenth Amendments and the judgment below should be affirmed. Furthermore, the new Texas legislation on primary elections (H.B.5, Texas Brief pp. 33-42) violates the First and Fourteenth Amendments and to that end we urge this Court to declare said Texas enactment unconstitutional.

Respectfully submitted,

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PROOF OF SERVICE

We, Joseph A. Calamia and John L. Fashing, two of the attorneys for the Appellees Pate and Guzman, et al, herein, and both members of the Bar of the Supreme Court of the United States, do hereby certify that on the 30th day of August, 1971, we served copies of the foregoing Appellees' Brief on the following attorneys of record for the appellants, to wit: Pat Bailey, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Charles F. Herring and John F. Morehead, 906 Perry Brooks Building, Austin, Texas 78701; Estil Vance, Jr., 1800 First National Bank Bldg., Fort Worth, Texas 76102; Mark F. Howell, 508 Southwest National Bank Building, El Paso, Texas 79901, by Air Mail and First class postage prepaid.

APPENDIX "A"

Art. 13.07a Deposit to accompany application for place on ballot

(1) Every candidate for public office who is subject to assessment by the county executive committee for a portion of the expenses of holding the primary election, except candidates for the Legislature and for the State Board of Education, shall pay to the county chairman, at the time of filing his application for a place on the ballot, a deposit of fifty dollars. In case of district offices in districts containing more than one county or part thereof, the candidate shall pay a deposit of fifty dollars to each county chairman with whom his application is filed. A candidate for the Legislature shall pay to the county chairman, at the time of filing his application, a deposit in the amount of the maximum which he may be assessed in that county, or the amount of the filing fee in that county in cases where a fixed fee is prescribed. A candidate for the State Board of Education shall pay to each county chairman, at the time of filing his application, the quotient obtained upon dividing fifty dollars by the number of counties in the district in which he is a candidate. The fees and deposits accompanying the applications shall become a part of the primary fund.

(2) After the county executive committee makes the assessments provided for in Section 186 of this code,[1] it shall refund to each candidate within thirty days thereafter the amount of the payment in excess of the assessment against the candidate if the deposit exceeds the assessment. If the deposit does not exceed the assessment, the balance due on the assessment shall be paid as provided in Section 186.[1]

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[1] Article 13.08.

Amended by Acts 1967, 60th Leg., p. 1909, ch. 723, § 41, eff. Aug. 28, 1967.

Art. 13.08 Expenses of primary

(1) Prior to the assessment of the candidates, the county committee shall carefully estimate the cost of printing the official ballots, renting polling places where same may be found necessary, providing and distributing all necessary poll books, blank stationery and voting booths required, compensation of election officers and clerks, and all other necessary expenses of holding the general primary and second primary in such county and on the second Monday in February preceding each primary, shall apportion such cost in such manner as in their judgment is just and equitable among the various candidates for nomination for district, county, and precinct offices only as herein defined, except the offices of Justice of the Court of Civil Appeals and member of the State Board of Education, and except the office of state senator and state representative if the assessment or fee payable to the county chairman is fixed at a definite amount, but taking into account the assessments and filing fees received from candidates for the Legislature and the State Board of Education. Where a district office covers more than one county, the assessment of such candidate by the county shall be not more than a sum which is the quotient of the amount which he would be assessed if he represented only one county determined by the formula used to assess county candidates, when divided by the number of counties in his district. In making the assessment upon any candidate the committee shall give due consideration to the importance, emolument, and term of office for which the nomination is to be made. Within 24 hours after adjournment of the meeting, the chairman shall mail to each person

against whom an assessment is made a notice stating the amount of such expenses apportioned to him and informing him that the difference between the amount of the assessment and the amount of the deposit which accompanied the candidate's application must be paid to the chairman on or before the fourth Monday in February; and no person's name shall be placed on the ballot unless he pays the assessment within the prescribed time. The notices shall be sent to the candidates by registered or certified mail, and the chairman shall obtain a receipt for each letter, postmarked by the post office at which the letter is mailed, as evidence of the mailing, and shall preserve the receipts for a period of three months.

(2) A candidate filing after the date of the aforesaid meeting shall not be required to accompany his application with the deposit provided for in Section 185a of this code,[1] but shall pay the full amount assessed against him by the county executive committee within one week from the date on which his application is filed; provided, however, that where a fixed filing fee is required for an office included in this section, the amount of the fee must accompany the application.

(3) It shall be sufficient to meet the requirements of this law to mail by registered or certified letter to the chairman before the deadline herein provided, as shown by the postmark on the letter, a money order, a certified check, or a cashier's check; but it shall not be sufficient to make the payment by any other type of mail unless it is delivered before the deadline.

(4) A candidate for the State Board of Education shall pay a filing fee of fifty dollars, which shall be prorated equally among the counties comprising the

[1] Article 13.07a.

district in which he is a candidate, and the prorated amount shall be paid to each county chairman at the time the candidate files his application for a place on the ballot.

Amended by Acts 1967, 60th Leg., p. 1910, ch. 723, § 42, eff. Aug. 28, 1967.

Art. 1308a. Assessment of candidates in counties having certain populations

Candidates for any precinct, county or district office and the office of Congress in counties which have a population of one million (1,000,000) or more, according to the last preceding Federal Census, except candidates for the State Legislature and State Board of Education, shall not be assessed a sum in excess of ten percent (10%) of the aggregate annual salary provided for any office of two-year terms, and fifteen percent (15%) of the aggregate annual salary provided for any office of four-year terms, to have their names placed on the ballot in any primary election. Candidates for the State Board of Education shall not be assessed a sum in excess of the amount stated in Section 186 of this Code.[1]

Notwithstanding other provisions of law, the county executive committee in any county which has a population of one million (1,000,000) or more, according to the last preceding Federal Census, may require candidates for State Representative to pay an amount not exceeding Five Hundred Dollars ($500) to have their names placed upon the ballot in a primary election. A candidate for nomination for State Senator shall pay the full amount of One Thousand Dollars ($1,000) as filing fee for office of State Senator to have his name

[1] Article 13.08.

placed upon the ballot in a primary election at the time he files his application for a place on the ballot. The payment must accompany the application and must be in the form of cash, money order, cashier's check or certified check. The application and payment must be delivered to the proper party chairman or secretary by the deadline for making application for a place on the ballot, and it shall not be sufficient for the application and payment to have been mailed before the deadline unless they are actually delivered by the deadline. After the county executive committee makes the assessments as provided in Section 186 of this Code, it shall refund to each candidate within thirty (30) days thereafter the amount of the payment in excess of the assessment against the candidate.

Notwithstanding other provisions of law, the county executive committee in any county which has a population of nine hundred thousand (900,000) to one million (1,000,000), according to the last preceding Federal Census, shall require candidates for State Senator or State Representative to pay the amount of Three Hundred Dollars ($300) to have their names placed upon the ballot in a primary election.

Notwithstanding other provisions of law, the county executive committee in any county which has a population of six hundred fifty thousand (650,000) to nine hundred thousand (900,000), according to the last preceding Federal Census, shall require candidates for State Senator to pay the amount of One Thousand Dollars ($1,000) and candidates for State Representative to pay the amount of Six Hundred Dollars ($600) respectively to have their names placed upon the ballot in a primary election; however, if part of such a county is joined to two (2) or more other counties to comprise a senatorial district, the county executive com-

mittee shall require candidates for State Senator of that senatorial district to pay the amount of Two Hundred Fifty Dollars ($250) to have their names placed upon the ballot in a primary election; and such payment must accompany the application and must be in the form of cash, money order, cashier's check, or certified check and which shall in no event be refunded in whole or in part except in case of the death of the applicant before the primary election. Any person making a refund or participating in making a refund in violation of the provisions of this paragraph is guilty of a misdemeanor and upon conviction is punishable by imprisonment in the county jail for not more than ninety (90) days or by a fine of not more than Five Hundred Dollars ($500) or by both.

In any State Representative District consisting of eight (8) and not more than nine (9) counties, the chairmen of the county executive committees shall require candidates for State Representative to pay an amount of Twenty-five Dollars ($25) for each of the counties in said Representative District, to have their names placed upon the ballot in a primary election.

Amended by Acts 1969, 61st Leg., p. 2275, ch. 766, § 1, eff. Sept. 1, 1969.

Art. 13.15. Filing fees for certain offices

Candidates for United States Senator and all those who are candidates for state offices to be voted upon by the qualified voters of the whole state shall pay to the chairman of the state executive committee $1,000. Candidates for Congressman-at-large or for justice of the court of civil appeals shall pay to the chairman of the state executive committee five percent of one year's salary. A candidate who is required to pay a filing fee as herein provided shall not be required to pay any

other sum to any other person or committee to have his name placed on the ballot as such candidate. Payment of the fee herein required must be made at the time the candidate files his application for a place on the ballot, and the name of no person who is required to pay a filing fee in any place or to the chairman of the state executive committee shall be placed on the ballot unless he has paid the fee in accordance with these provisions.

Amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 31, eff. Sept. 1, 1969.

Art. 13.16. Payments by candidates for state senator or representative

Subdivision 1. Except as otherwise provided in this code, no candidate for nomination for state senator shall be required to pay to the county executive committee to have his name placed on the primary ballot more than the following amounts:

1. One dollar per county for counties having a population of less than 5,000.

2. Five dollars per county for counties having a population of 5,000 and not more than 10,000.

3. Ten dollars per county for counties having a popplation of more than 10,000 and less than 40,000.

4. Fifty dollars per county for counties having a population of 40,000 and not more than 125,000.

5. Seventy-five dollars per county for counties having a population of more than 125,000 and not more than 200,000.

6. One hundred dollars per county for counties having a population of more than 200,000.

7. One hundred dollars per county for all senatorial districts composed of no more and no less than two counties, regardless of the population of such counties.

The population in each case is to be determined by the last preceding federal census.

Subdivision 2. Except as otherwise provided in this code, each candidate for nomination for state representative shall pay a filing fee of $150. In districts containing all or part of more than one county, the filing fee shall be prorated among the counties comprising the district on the basis of the percentage of the population of the district residing in each county, as determined by the last preceding federal census. The chairman of the state executive committee of each political party which is holding a primary election shall compute the prorations and shall forward to the chairman of each county executive committee of that party the pertinent information for his county not later than the first day of December preceding the election year.

Subdivision 3. Where some other section of this code provides for an assessment or filing fee at variance with this section, the special provision of the other section shall control.

Amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 32, eff. Sept. 1, 1969.

APPENDIX "B"

OFFICE OF THE SECRETARY OF STATE

PROPOSED ELECTION LAW CHANGES

A REPORT TO THE 52ND LEGISLATURE
OF THE STATE OF TEXAS

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STATE OF TEXAS
OFFICE OF THE SECRETARY OF STATE
AUSTIN, TEXAS 78711

Martin Dies Jr.
SECRETARY OF STATE

W. O. Bowers III
ASST. SECRETARY OF STATE

To The 62nd Legislature:

Our state now ranks fourth in the nation in population. This growth has put great strains in our election procedures that once worked well in a rural state. During my tenure as Secretary of State, I have observed areas of our present election process that are now failing to fulfill the needs of the state. Also, some of our present election laws have been challenged in the courts. If the challenges are successful, many changes will have to be made by the 62nd Legislature as we will be unable to hold primary elections or register voters until the changes are adopted.

In this report, I address myself to the areas that deserve immediate attention, primary elections and voter registration. As the chief election officer of the State of Texas, I have made studies of the present system in this state and in many other states with comparable populations. The recommendations made reflect procedures which are now being used in other states with great efficiency and accuracy.

I believe Texas must soon adopt new procedures in regard to the operation of our primaries and the method of registering voters. Hopefully, the information contained in this report will be of help to the 62nd Legislature when it considers election law reform.

MARTIN DIES, JR.
Secretary of State

PRIMARY ELECTIONS

The Texas primary election process is unique among the major states in the nation. A vast majority of the states and all of the populous states that hold primaries operate their primaries in a manner similar to their general elections. This office did not encounter a single state with a similar population which placed the burden of holding and financing primary elections upon the participating political parties.

However, the need for change in Texas' primary system does not stem from the fact that Texas is the only state in the nation utilizing party operated primaries. This office does not believe that uniqueness is bad or that popularity is necessarily good. The present Texas system has simply reached a crisis in its operation that cannot be cured by slightly altering our present procedures. There are three factors that make operation of future primaries under our present system impractical if not impossible. These factors are as follows: the failure of the present system to provide adequate financing; the present filing fees cannot be increased to cover the need for funds; and the courts are very likely to strike down the entire primary assessment procedure. A discussion of

these factors follows.

(1). The present method of financing our primaries is no longer providing adequate funds for the proper operation of modern elections. Counties with large populations have now reached their statutory limits on assessments. The Democratic County Chairmen in Harris and Dallas counties have informed this office that they cannot finance another primary with the existing limitations on assessments. (See Appendix "C") In some instances, we have already noted a tendency for some party county committees to attempt to reduce the number of voting boxes because of their inability to pay for additional staff and equipment. This is not a reflection upon those county committees, but an indication that present financing is inadequate. Some primaries held in counties where voting machines are normally used are being held with paper ballots because of the extra expense of voting machines.

These changes are not healthy for Texas' elections. Combining voting precincts sometimes means long lines at polling places which discourage voters and alienate election workers. Voting on paper ballots in one precinct while other precincts are using voting machines creates difficulty for the voter and for election officials. Election officials in highly populated voting precincts simply cannot count

the paper ballots in a reasonable time with reasonable accuracy without hiring extra employees which are costly and many times inexperienced.

(2) Filing fees are already at maximum levels. The problem of election costs could be relieved somewhat by removing the limitations on assessments for candidates. This avenue might be feasible if it were not for the fact that at present Texas has the highest primary filing fees in the nation. In fact, a survey of all of the states shows absolutely no state which has primary filing fees that even approach the levies in Texas. Attached in Appendix "A" is a schedule of filing fees for county and state offices in other states. It should be noted that excluding Texas, 6 percent of an annual salary is apparently the highest levy in the United States for primary filing fees for county and state offices. Most states charge 2 percent or less of the annual salary.

Present assessments in Texas' metropolitan areas are now in the range of 20 to 30 percent of the annual salary of the office. Even after distribution of the surplus funds, if any, many county and district officials paid 20 percent or more of their annual salary in filing fees. District judges in Tarrant County were assessed approximately $8,900 in 1970. This figure represents about 30 percent of their annual salary.

Raising the assessments would not solve the problem. The expenses of a primary election vary proportionately with the number of voters. The number of candidates in each race has relatively little effect on overall expenditures. Extremely high filing fees sometimes have the effect of reducing the number of candidates who will file for nomination. When fewer candidates file for office, there is less money to operate the primaries. For instance, Harris County Democratic primaries in 1970 cost less than the primaries in 1968. Yet the assessments to the candidates were higher because fewer candidates filed for nomination.

(3) The most important factor is that of the questionable constitutionality of Texas' primary assessment system. Suits were filed in Federal District Courts prior to the 1970 primary elections claiming the fees made it impossible for a man of modest means to run for county office. A three judge federal panel in Dallas ordered the names of three candidates be placed on the ballot without paying the filing fees. The court will soon deliver a final opinion in the matter. Considering previous federal cases in other states and the prior ruling of this federal panel, it is most likely that the present filing fee system will be held unconstitutional. Such a ruling will make it impossible to operate another general primary under present law. However, the other fac-

tors discussed also make it imperative that some different route be taken in the financing and operation of Texas primaries. A short discussion of present primary operations is helpful in understanding what changes are needed.

The Texas Primary Operation at Present

Presently the operations of the Texas primaries are almost entirely candidate financed. A statutory system of assessments allows the local county committees to estimate the cost of the primaries and assess most primary candidates some share of the cost. Some offices have fixed fees, but the candidates must bear all the election expenses in each county. Rural counties, where county salaries are low, assess between $400.00 and $800.00 for county offices. However, in metropolitan areas it is not uncommon to find assessments of over $4,000.00 for some offices. These figures contrast with the fixed fee of $1,000.00 for all statewide offices including United States Senator.

The assessment system is also subject to criticism because it is common for the original assessments to be inflated. There are few statutory limitations on the county committees and these officials are justifiably afraid of not having enough money to pay for the primary. These assessments must be partially refunded to the candidates later.

This procedure consumes a considerable amount of the county committee's time because the primary fund must be audited and all expenses must be paid before the refunds can be made. Disagreements between candidates and county committees are frequent, and many candidates feel that they were over-assessed because of the large refunds which in many instances are not returned until months after the primaries.

Finally, the party cannot retain any of the money in the primary fund. This practice leaves the local parties strapped for operating expenses. In many states this is not the case and those systems will be discussed later.

Present Cost of Primaries

This office has made an extensive study of the present cost of the primaries. Attached in Appendix "B" is an abbreviated list of county by county cost figures for the 1968 and 1970 primaries. Since some counties did not report, we have made some estimations to reach the total cost figures. From this study, we have concluded that the Texas primaries cost approximately $1,[illegible]00,000 in 1970. This figure does not include the cost of the county clerks' time in holding absentee voting. It does include both Democratic and Repub-

lican primaries. The 1968 figures are incomplete, but it is estimated that the total cost did not exceed $1,600,000.

The major cost of the primaries are voting equipment and personnel. The Republican party's expenses are not representative as they do not hold primaries in all counties and they usually do not field a full slate of candidates in counties where primaries are held. Also the party gets a large amount of volunteer help which reduces its costs.

The cost of the primaries are increased by the practice of holding dual primaries. If the Republican party held primaries in all Texas counties, there would be a complete duplication of effort in every election precinct. As far as this office could determine, this situation exists in no other state. This cost in money and manpower is eliminated in all other states by holding a unitary primary. A description of a good unitary primary system will be discussed later in this report. It is enough to say that presently our primary system is costing more than necessary where both parties are holding elections in the same precincts.

The Problems of Partisan Primary Operations

Presently the primary election operation is a completely partisan operation. This factor may well have some good points, but it is not

the optimum procedure for holding elections. Practically, partisan operation places the responsibility for policing the elections on the shoulders of the political parties. This procedure is an unnecessary burden on the parties. Presently any disagreement over the operations of the primaries automatically creates an intra-party dispute and many times causes unnecessary election contests. This problem is minimized in other states where the primaries are operated by the state and county much as the general election is operated here. For instance California, which operates its primaries with members of both parties represented, has not had an election fraud case in 25 years and election contests are few.

Recommended Primary Procedures

The Secretary of State recommends that Texas adopt procedures making the operation of the primaries a state and county responsibility. This will allow the state and county governments to share the cost of the primaries. It will lead to a unitary primary system that will eliminate duplication and waste and it will mean basically bi-partisan operation of the elections. This should reduce election irregularities and restore the confidence of many voters in the primary election system. Most importantly it will allow the legislature to

set reasonable filing fees for all offices which will meet constitutional muster.

Suggested Financing for Unitary System

In most states the counties bear the majority of the primary election cost. In Texas at present the counties pay all expenses of the general election. There are, of course, no filing fees for the general election in Texas so the county assumes the entire cost. In studying other states' primaries, we have found that, in some instances, the county and state share the cost for primary elections. Financing would come from the county and state general funds to be partially offset by candidate filing fees which would be paid to the state and county. Below is a hypothetical unitary primary financing structure for Travis and El Paso Counties.

In the 1970 Democratic Primary, Travis County had 42 district and county candidates on the ballot that paid the assessments. These assessments ranged from $4,860.00 for district judge to $5.00 for the State Board of Education. Total assessments collected equalled approximately $54,000.00. The actual expenses were $31,000.00. The surplus was refunded to the candidates. (The expenses for Travis

County are rather low because of the use of paper ballots.)

If filing fees were set at a maximum of $1,000.00 for district judges, $500.00 for most county offices, and $200.00 for legislative seats, the county would have received approximately $16,000.00 in filing fees. If the total fees were used to offset primary expenses, the county and state would need to supply only $15,000.00 to pay for the primaries in Travis County. (We use only Democratic figures as a unitary primary should cost approximately the same as the Democratic primary in most counties.)

El Paso County, which has a similar population to Travis County, uses voting machines. They expended $47,000.00 in the 1970 primary. Using the same filing fee schedule, they would have collected approximately $20,000.00 in fees. The county and state would have had to supply $27,000.00 to cover the cost in El Paso. In counties that use voting machines and counties with a two party organization, unitary primary cost should exceed the Democratic party primary figures by about 10%.

From these examples, it is not difficult to predict that lowered filing fees could easily contribute one-third of the primary cost in most counties. Using this figure, the 1970 primaries would have

cost the combined state and county governments approximately $1,100,000.

As stated before the counties could bear the total extra expense of the election. This would mean that El Paso County would need to budget an extra $30,000.00 every two years. Harris County would probably need to budget an extra $125,000.00 every two years. Most rural counties would find it necessary to increase budgets by only a few thousand dollars with expenses at present levels.

Studies of other states indicate that $1.00 per vote is a good average cost per election. At present, Texas elections are not costing $1.00 per vote. However, even if that figure were reached, the State's share of the election cost would not soon exceed two million dollars ($2,000,000) per general primary election.

If the state shared the expenses, it would most easily be done by reimbursing the county governments a fixed fee per voting precinct. If a figure of $100.00 per 2000 voters were used, the cost to the state every two years would be approximately $550,000. This amount would reimburse the county for approximately one-half (½) of the additional expenses of operating the primaries.

Operational Aspects of the Unitary Primary System

The unitary primary closely resembles the general election. The election officials in each precinct are appointed by the county election board. The election judge and alternate are selected for ability and experience in holding elections. The clerks are selected from a list prepared by the respective parties. In almost every instance the holding of the election will be a bi-partisan effort. As there will be only one polling place and one set of election officials per precinct, there should be an ample supply of experienced election officials.

All voters in the same precinct will vote in the same location. If the precinct uses paper ballots, the Democratic and Republican ballots will be of different colors. The ballots, after being voted, may be placed in the same ballot box as the different color scheme will allow easy identification during counting. The voter will simply be asked in which primary he wishes to vote and he will be given the proper ballot.

In precincts using voting machines, there are two different methods of voting. In some states, each precinct has at least two machines. One machine is used for Democratic voters and the other machine for Republican voters. In California, both Democratic and Republican ballots are placed on one machine. The voter indicates

in which primary he wishes to vote and the election judge simply locks out the ballot of the other party. In this manner it is impossible to vote in the wrong primary or in both primaries. This method is much less expensive, especially if one party polls significantly fewer voters than the other party.

Tabulation of votes becomes a bit more complicated as votes for both primaries are being counted. However, this factor does not seem to create undue difficulty and can be compensated for by adding an extra clerk in precincts which have heavy turnouts in both primaries. All other aspects of the present election procedures can be retained. Party affiliation can be determined at the polls as is now done. If one party has no candidates to file in the county, the election would be held much as it is now.

Party Financing Under a Unitary Primary System

As mentioned earlier the present primary assessments cannot be used by the parties for any purpose other than financing the primaries. This leaves the party with no funds for other operations. In many states primary filing fees are either totally or partially allocated to the respective political parties. In Alabama, for instance, the entire 2 percent (2%) fee is retained by the parties. In New Mexic

part of the primary fees are allocated to the parties and the other part is used to partially offset primary election cost. This procedure provides local county committees and state committees operating funds. Also, these funds can be allocated to the parties' candidates in the November general election. In Florida, state law requires that one-half of the primary fund be allocated to local party campaigns in the general election.

The above described system has been approved by the federal courts. It is noted here because the change in the present primary system will deprive local county committees of some operating funds.

Cost of Unitary System

It should be obvious that the unitary primary will reduce primary election costs over the present dual primary system. The present system is relatively inexpensive only because of the absence of a complete two party primary operation and of the continued use of paper ballots in most counties. There is no doubt that an increase in voting population and continued urban growth which requires modern voting equipment such as machines or electronic voting devices is going to increase election costs. The unitary primary system is the only answer to these increasing financial problems.

Actual election cost figures from other states are not particularly helpful in determining cost as differing election procedures may result in vastly different expenditures. Studies by this office indicate that the future operational cost of a unitary primary system in Texas will not be a great burden on the state or counties. The cost figures listed in Appendix "B" give some guidance as to present election cost. The initial changeover to a unitary system could create some extra expense. It appears, however, that most precincts could convert with a minimum of expenses. Only in areas with high voter participation in both primaries would expenses increase over the present cost of Democratic primaries. Due to low voter turnout in the Republican primaries in 1968 and 1970, it would seem that these primaries could have been financed at a level near the cost of the Democratic Primary.

Statutory Changes Necessary for Unitary Primary Procedure

This office has reviewed the present statutes governing our primaries. A majority of the Articles in Chapter 13 of the present Code will require either elimination or amendment. These laws deal primarily with the organization and financing of the present primary system. A number of other statutes will require changes. This of-

fice is now in the process of identifying every statute that relates to the party primaries. If the court holds that the present system is invalid or if the legislature feels that the changes should be made in any case, this office stands ready to provide specific suggestions on amendments to change the present system.

Conclusion

The Secretary of State believes that a change in present primary operations are needed regardless of the outcome of the court cases. Public confidence in the primary election process is imperative if our representative form of government is to continue to have the support of all the people. The present procedures simply cannot perform adequately in today's Texas, much less in the future.

APPENDIX B

1968-1970 DEMOCRATIC PRIMARY ELECTION EXPENSES

	1968	1970
Angelina	8,000.00	6,862.00
Aransas	1,646.33	1,976.97
Armstrong	680.81	814.23
Atascosa	3,218.00	4,182.00
Bandera	No Figures	1,477.13
Bastrop	3,427.46	3,008.47
Baylor	1,584.10	2,450.04
Bee	7,246.36	4,836.19
Bell	13,297.60	10,372.94
Bexar	101,447.15	122,388.16
Borden	1,680.72	1,121.92
Brazoria	11,423.48	12,617.00
Brazos	7,749.38	6,634.67
Burnet	1,938.00	1,344.00
Calhoun	4,190.89	2,893.91
Callahan	No Figures	2,322.77
Camp	3,017.45	4,357.17
Cass	5,052.39	5,091.80
Castro	No Figures	1,132.47
Childress	1,272.70	No Figures
Coke	No Figures	1,083.25
Collin	9,730.03	10,687.40
Collingsworth	1,958.34	1,832.79
Colorado	3,900.33	3,124.89
Comal	3,100.31	3,809.80
Comanche	3,633.04	2,998.19
Cooke	5,427.06	7,571.17
Coryell	No Figures	2,230.59
Cottle	No Figures	1,621.69
Crane	1,825.35	1,463.67
Crockett	1,148.87	616.98
Dallas	115,793.20	158,867.03
Dawson	No Figures	2,404.71
Denton	8,898.75	9,518.15
Dickens	1,294.75	1,746.01
Dimmit	1,194.04	1,177.98
Donley	1,621.65	1,287.36
Duval	3,188.01	3,231.04
Ellis	7,620.45	8,280.53
Falls	No Figures	2,935.29
Fannin	4,078.00	5,046.00
Fayette	3,359.27	2,326.97
Foard	1,438.27	852.11
Fort Bend	6,817.88	5,990.53
Franklin	3,616.12	2,505.74
Freestone	2,992.04	3,415.09

	1968	1970
Galveston	26,610.38	24,578.62
Garza	1,809.46	2,165.25
Gonzales	2,075.00	2,464.00
Gray	3,500.00	3,528.41
Grayson	20,010.00	21,537.61
Grimes	No Figures	1,929.31
Guadalupe	2,580.05	1,979.08
Hale	2,796.47	3,225.37
Hall	1,849.92	986.97
Hardeman	1,403.48	1,288.59
Hardin	No Figures	12,400.00
Harris	173,848.00	162,000.00
Hartley	1,108.00	1,126.00
Henderson	3,815.13	4,537.04
Hill	6,010.43	7,425.00
Hockley	3,787.48	2,422.48
Hudspeth	1,439.00	1,550.87
Hutchinson	5,953.61	6,040.35
Jackson	No Figures	6,040.52
Jasper	5,247.81	4,266.47
Jeff Davis	627.75	560.33
Jim Hogg	5,779.66	9,301.95
Jim Wells	5,497.68	7,979.31
Jones	2,772.14	1,899.11
Karnes	4,879.65	3,146.82
Kaufman	4,087.97	5,341.83
Kenedy	441.63	274.64
Kerr	3,534.94	3,448.44
Kimble	655.18	932.20
King	No Figures	550.33
Knox	2,552.30	2,117.83
Lamb	3,861.17	2,101.16
Lampasas	1,608.00	1,957.00
LaSalle	1,325.62	1,538.98
Lavaca	2,447.80	2,860.89
Lee	3,491.88	2,649.15
Liberty	7,352.18	6,314.30
Limestone	2,725.90	2,102.36
Lipscomb	870.32	913.28
Live Oak	3,577.16	2,060.71
Lubbock	17,158.36	11,315.26
Lynn	No Figures	1,300.09
Marion	No Figures	2,300.00
Mason	No Figures	1,164.24
Maverick	4,491.52	5,382.00
McCulloch	2,116.96	2,117.95

	1968	1970
McLennan	13,546.04	13,574.26
Menard	921.30	1,694.18
Milam	6,686.66	3,925.86
Mills	2,100.00	977.52
Mitchell	No Figures	2,690.46
Montague	3,588.34	3,180.27
Montgomery	3,577.16	2,060.71
Moore	4,727.73	4,141.43
Morris	No Figures	2,082.16
Motley	479.25	464.25
Nueces	34,600.00	39,900.00
Ochiltree	1,242.98	1,470.00
Oldham	712.75	996.78
Parker	4,677.56	4,393.77
Parmer	1,788.30	1,508.15
Rains	1,056.81	987.22
Randall	4,587.57	3,972.09
Reagan	No Figures	1,598.66
Real	1,165.00	475.00
Red River	4,200.00	3,158.00
Robertson	4,828.96	5,154.65
Rockwall	2,099.11	1,855.76
Runnels	No Figures	2,041.72
Rusk	7,348.49	7,074.55
Sabine	3,297.29	3,719.05
San Augustine	3,461.84	2,747.11
San Jacinto	2,856.66	2,408.75
San Saba	2,634.88	1,121.21
Shackelford	1,041.62	1,197.65
Smith	10,457.94	13,598.03
Somerville	No Figures	698.47
Sterling	868.00	740.00
Sutton	457.28	381.84
Tarrant	61,825.41	92,470.43
Taylor	9,475.00	5,295.51
Terry	4,358.33	3,780.08
Throckmorton	1,890.87	1,700.34
Tom Green	No Figures	6,425.76
Travis	No Figures	30,866.93
Tyler	4,482.36	4,412.41
Upshur	No Figures	7,507.10
Upton	2,037.11	2,491.62
Uvalde	3,716.19	2,502.15
Val Verde	3,444.83	5,496.09
Waller	4,011.42	3,549.60

	1968	1970
Ward	4,950.00	4,556.69
Washington	2,000.00	1,700.00
Wheeler	No Figures	2,297.00
Wichita	10,587.76	8,420.95
Wilbarger	4,280.48	5,141.54
Williamson	5,246.98	4,639.98
Wilson	3,890.09	3,109.01
Winkler	2,444.20	2,936.98
Wise	No Figures	2,718.17
Yoakum	2,216.33	2,020.13
Young	3,070.08	1,638.89
Zapata	No Figures	2,183.82

Election Crimp Due

County Growth Puts Ceiling on Filing Fees

By TOM JOHNSON

Dallas County's preliminary 1970 census figure of more than a million people could well put a serious crimp in future primary elections, at least as far as money goes.

State law specifies limits for filing fees which can be assessed candidates by political parties in counties of more than 1,000,000 population — currently only Harris (Houston) and Dallas.

This means, paradoxically, that Dallas County political parties in 1972 primaries will be prohibited from collecting assessments as large as they could have been this year.

Dallas County's 1960 census mark of 951,000 put it in a statutory category in which there were no limits on filing fees which could be charged.

Now, though, by virtue of eclipsing the million figure an upper limit will be clamped on such fees.

"WE JUST CAN'T finance elections in Dallas County as we have in the past on such a system," said Democratic County Chairman Earl Luna.

The Legislature has set fixed filing fees for all legislative and statewide offices.

But this year, for example, in Dallas County, other Democratic candidates were assessed filing fees of 6 per cent of the total salary of the offices they sought.

In the case of a district judgeship, a 4-year term with an annual salary of $28,000, the Democratic fee was $6,720.

For the U.S. House of Representatives, a 2-year office with annual salary of $42,500, Democratic candidates had to put up $5,100 to get their names on the ballot.

The statutory limitation for counties over a million breaks down like this:

— For 4-year terms, filing fees cannot exceed 15 per cent of one year's salary of the office.

— For 2-year terms, fees cannot exceed 10 per cent of one year's salary.

PERHAPS SIGNIFICANTLY, the Republican party of Dallas County this year charged filing fees exactly in line with the million-plus limitation.

But Luna pointed out that the Democratic party would have collected $42,500 less in fees this year from 17 district-level judgeship candidates alone had the new limitation been in effect.

Luna estimates that both Democratic primaries this spring cost the county party about $156,000, so a slash incurred by the loss in fees from just the judgeships would be quite severe.

Maximum filing fees in Dallas County under the law as it now stands would allow parties to collect $4,200 from 4-year judgeships and $4,250 from congressional candidates.

Both figures are significantly below what the Democrats have been charging such candidates.

With inflation pushing up the cost of leasing voting machines and paying salaries for election workers already, what will the million population limitation mean to Dallas Democrats?

"WE CAN DO ONE of three or four things, as I see it," Luna said in an interview.

"We can try to get the Legislature to amend the statutes so that there would be no limit on what we can assess.

"If the Legislature does nothing in this regard," Luna went on, "we'll have to either cut the pay (currently $2 an hour) of election workers, recruit volunteer workers or simply put out our hand and ask the public for donations."

He said the cost of salaries for election workers was by far the single largest cost of holding Democratic primary elections here, with the cost of renting voting machines the second costliest item.

But if Harris County has been living with the limitation, why can't Dallas?

"Well," Luna said, "Harris County had to do some of the things I was talking about this year. They cut salary for election workers back to $1.50 an hour and had to use some volunteers to make ends meet."

GOP COUNTY CHAIRMAN Tom Crouch has less of a headache with primaries than Luna because the Republicans traditionally field fewer candidates and fewer voters participate in the GOP primary.

"All our election workers right now are volunteers, they work on a free basis," Crouch said, adding that this spring's GOP primary cost in the neighborhood of $50,000.

"If you know you're going to have only about 150 people voting on election day, it's not too hard to get volunteers. A lot of them are women who know they'll be able to keep on with their knitting while they're conducting the election.

"But it becomes a much more difficult job if you know and they know that 1,000 people will vote, and the workers will have to put in a hard, 15-hour day," Crouch said.

Both county chairmen agreed that lowering the voting age to 18 would add to their problems, in that it's a general rule that elections get more expensive in proportion to the number of people who vote.

COUNTY TAX ASSESSOR-Collector Ben Gentle predicted last week that lowering the voting age could swell the number of eligible voters in the county by perhaps 100,000.

President Nixon has reportedly not yet decided whether to sign a bill on his desk that would lower the voting age to 18. The Texas Constitution holds that no person under 21 can vote.

Luna said the natural population increase projected for Dallas County will make the voting lists get longer and longer, regardless of the voting age situation.

He said the number of voting precincts in the county will continue to increase as certain precincts get over-populated.

The Texas Election Code says county commissioners must keep redrawing precinct lines every four years so that no precinct contains more than 2,000 voters (3,000 if machines are used).

APPENDIX "C"

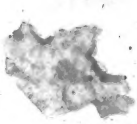
FROM: MARTIN DIES, JR., SECRETARY OF STATE OF THE STATE OF TEXAS

TEXAS OFFICIAL VOTE FOR GOVERNOR

GENERAL ELECTION - NOVEMBER 3, 1970

COUNTIES	Democratic	Republican	Others
	PRESTON SMITH	PAUL EGGERS	
Anderson	3,553	2,537	
Andrews	1,419	1,030	
Angelina	6,596	3,775	14
Aransas	904	799	1
Archer	1,284	569	
Armstrong	448	308	
Atascosa	2,385	1,078	
Austin	1,856	1,464	1
Bailey	1,028	735	
Bandera	1,017	720	5
Bastrop	2,405	1,224	
Baylor	1,249	514	
Bee	2,383	1,964	
Bell	9,091	4,846	
Bexar	80,786	57,927	
Blanco	646	448	
Borden	213	103	
Bosque	1,950	1,090	
Bowie	7,532	4,289	4
Brazoria	12,250	11,014	6
Brazos	5,373	5,938	11
Brewster	1,102	649	3
Briscoe	520	522	1
Brooks	1,768	695	
Brown	3,464	1,966	
Burleson	1,876	581	
Burnet	1,997	1,428	
Caldwell	2,412	1,085	1
Calhoun	2,075	1,371	
Callahan	1,552	638	2
Cameron	12,415	9,610	2
Camp	1,434	581	

Carson	1,224	929	
Cass	3,747	1,447	
Castro	1,401	606	
Chambers	1,491	957	10
Cherokee	3,963	2,126	2
Childress	1,482	730	
Clay	1,722	865	
Cochran	763	284	
Coke	710	212	
Coleman	1,739	843	1
Collin	6,829	5,962	
Collingsworth	937	439	
Colorado	1,986	1,666	
Comal	2,444	2,860	6
Comanche	2,147	955	3
Concho	551	242	
Cooke	3,017	2,442	
Coryell	3,303	1,301	
Cottle	932	214	
Crane	893	427	17
Crockett	510	312	
Crosby	1,669	353	1
Culberson	396	282	1
Dallam	716	675	
Dallas	111,000	150,830	32
Dawson	2,166	1,115	
Deaf Smith	1,882	1,380	
Delta	1,087	261	
Denton	6,854	7,332	3
Dewitt	2,051	1,719	
Dickens	984	221	
Dimmit	1,149	527	2
Donley	823	554	
Duval	3,434	272	
Eastland	3,084	1,701	
Ector	8,966	7,210	
Edwards	306	148	



Ellis	5,239	3,092	
El Paso	27,315	22,547	8
Erath	2,811	1,709	3
Falls	2,314	1,618	
Fannin	4,020	1,283	
Fayette	2,615	2,001	
Fisher	1,303	314	
Floyd	1,838	774	
Foard	554	154	
Fort Bend	4,723	4,049	
Franklin	1,157	304	1
Freestone	1,911	894	
Frio	1,136	532	2
Gaines	1,615	633	
Galveston	19,517	16,641	1
Garza	877	451	
Gillespie	1,201	1,724	6
Glasscock	193	114	
Goliad	700	510	
Gonzales	2,143	897	2
Gray	3,349	4,559	
Grayson	9,895	6,172	
Gregg	6,149	9,518	
Grimes	1,541	973	
Guadalupe	3,792	3,628	
Hale	4,389	2,656	
Hall	1,215	466	
Hamilton	1,264	755	
Hansford	660	854	
Hardeman	1,305	587	
Hardin	3,810	2,119	
Harris	152,772	205,574	
Harrison	5,800	4,303	
Hartley	474	425	1
Haskell	1,954	400	
Hays	2,614	2,065	
Hemphill	529	527	

Henderson	3,558	2,187	
Hidalgo	17,154	12,588	
Hill	3,379	1,473	
Hockley	3,015	1,304	
Hood	1,141	412	
Hopkins	3,291	1,374	
Houston	3,169	1,298	
Howard	4,196	2,928	
Hudspeth	438	156	
Hunt	5,653	3,827	
Hutchinson	3,120	3,837	9
Irion	210	137	
Jack	1,283	778	
Jackson	1,997	1,250	
Jasper	2,613	1,644	9
Jeff Davis	245	137	
Jefferson	27,504	25,377	3
Jim Hogg	1,003	411	
Jim Wells	4,254	2,518	
Johnson	5,034	3,902	
Jones	2,472	864	
Karnes	2,109	887	
Kaufman	3,722	1,935	5
Kendall	745	1,244	
Kenedy	120	36	
Kent	414	92	3
Kerr	2,489	2,859	35
Kimble	741	306	
King	134	37	
Kinney	466	131	
Kleberg	3,217	2,505	
Knox	1,432	327	
Lamar	5,081	2,461	
Lamb	2,609	1,489	2
Lampasas	1,347	639	
Lasalle	902	256	
Lavaca	2,390	1,315	

Lee	1,292	750	
Leon	1,647	511	
Liberty	3,762	2,329	
Limestone	2,882	1,174	
Lipscomb	631	734	
Live Oak	1,276	668	
Llano	1,284	1,044	
Loving	43	23	
Lubbock	23,614	10,875	2
Lynn	1,448	486	
Madison	1,040	595	
Marion	1,139	633	
Martin	694	259	
Mason	597	566	
Matagorda	3,403	2,381	1
Maverick	1,339	475	
McCulloch	1,444	607	
McLennan	20,528	12,599	18
McMullen	229	132	
Medina	2,183	1,399	
Menard	541	295	
Midland	6,892	9,584	2
Milam	3,149	1,313	1
Mills	775	389	
Mitchell	1,514	496	
Montague	2,575	1,669	
Montgomery	5,629	5,316	29
Moore	1,835	1,675	
Morris	2,020	815	2
Motley	560	241	
Nacogdoches	3,994	2,436	1
Navarro	4,884	2,283	
Newton	1,681	635	2
Nolan	2,756	1,134	
Nueces	22,140	18,395	6
Ochiltree	1,050	1,284	
Oldham	383	249	

Orange	7,613	6,159	
Palo Pinto	3,804	2,111	
Panola	2,565	1,377	
Parker	4,482	3,168	
Parmer	1,381	796	
Pecos	1,868	1,000	4
Polk	2,180	850	2
Potter	8,610	9,615	6
Presidio	1,127	323	
Rains	691	288	2
Randall	6,072	8,006	15
Reagan	539	290	
Real	232	169	
Red River	2,953	853	
Reeves	1,627	797	
Refugio	1,308	785	
Roberts	219	258	
Robertson	2,686	860	
Rockwall	1,218	642	6
Runnels	1,719	1,023	
Rusk	4,180	3,601	
Sabine	1,375	462	
San Augustine	1,042	371	
San Jacinto	992	406	
San Patricio	4,979	3,028	
San Saba	1,085	390	
Schleicher	426	281	1
Scurry	2,486	1,152	
Shackleford	688	381	
Shelby	3,099	938	1
Sherman	388	452	
Smith	9,726	12,507	
Somervell	448	188	
Starr	3,310	2,184	
Stephens	1,349	840	
Sterling	223	83	
Stonewall	758	146	

Sutton	377	216	
Swisher	1,879	604	
Tarrant	62,117	72,706	
Tyaler	10,278	7,235	24
Terrell	246	162	
Terry	2,029	931	
Throckmorton	646	266	
Titus	2,922	1,053	
Tom Green	7,652	6,266	1
Travis	34,933	34,244	
Trinity	1,179	595	
Tyler	1,798	1,193	
Upshur	3,238	1,856	5
Upton	718	544	
Uvalde	1,985	1,377	
Val Verde	2,819	1,274	
Van Zandt	3,080	1,657	
Victoria	6,061	4,912	2
Walker	2,426	1,661	
Waller	1,579	800	
Ward	1,971	1,158	24
Washington	2,410	1,794	
Webb	6,952	2,275	
Wharton	3,938	2,989	
Wheeler	1,060	816	
Wichita	16,264	11,231	3
Wilbarger	2,764	1,251	1
Willacy	1,964	981	
Williamson	4,594	2,228	6
Wilson	2,135	843	
Winkler	1,716	1,190	
Wise	2,842	1,622	
Wood	2,761	1,869	3
Yoakum	1,123	579	
Young	2,714	1,428	
Zapata	745	392	
Zavala	1,123	472	
Grand Totals	1,197,726	1,037,723	398